BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID HAASE	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,058,310
	)	
SHAWNEE COUNTY	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the April 13, 2012, preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders. Jan L. Fisher, of Topeka, Kansas, appeared for claimant. Larry G. Karns, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant did not suffer an aggravation of a preexisting condition but rather sustained a separate and distinct injury that arose out of and in the course of his employment. The ALJ further found the work accident was the prevailing factor in claimant's injury and current need for treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 11, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ incorrectly found that claimant sustained an accidental injury that arose out of and in the course of his employment and that claimant's work activity of August 4, 2011, was the prevailing factor causing his injury, medical condition or resulting disability or impairment. Respondent argues the prevailing factor causing claimant's injury and medical condition was his preexisting avascular necrosis.

Claimant submits that he sustained a personal injury by accident that arose out of and in the course of his employment with respondent. Claimant argues the act of shoveling was the prevailing factor causing his injury, medical condition and disability.

The issues for the Board's review are:

(1) Did claimant sustain personal injury by accident that arose out of and in the course of his employment with respondent?

(2) Was claimant's accident the prevailing factor causing his injury, medical condition and disability?

FINDINGS OF FACT

Claimant began working for respondent in 2005 in road maintenance. His job entailed manual labor and included fixing potholes, building roads, asphalting, and hauling material. As part of his job, he would regularly lift as much as 50 pounds. Before August 4, 2011, claimant had no problem lifting those weights. Also before August 4, 2011, claimant had not had any problems with either his pelvis or hips. He had never been told he had any disease process in his hips. Specifically he was never told he had avascular necrosis.[1]

Claimant did have some previous problems with hernias. His last hernia condition was in the spring of 2011, and he had the hernia surgically repaired in May 2011. After the surgery, claimant did not believe the hernia was healing as fast as it should. In June 2011, claimant went back to the doctor, and a CT scan was performed of claimant's entire hip and pelvis area on June 17, 2011. It was essentially normal but did reveal "calcific atherosclerotic vascular disease."[2] Claimant returned to work on July 5, 2011, performing his regular job duties.[3]

On August 4, 2011, claimant was at work shoveling some asphalt. He described the work as pushing the shovel into the asphalt, lifting the asphalt in the shovel, carrying it to the spot it was needed, dumping the asphalt, and returning to get another shovelful. Claimant said he would brace his arm against his pelvis and hip area to shovel. As claimant was performing this task, he felt a shooting pain in his groin area. Later that day, claimant reported his problem to the road maintenance supervisor, Jerry King. Mr. King took claimant to the emergency room. Claimant told the emergency room personnel that he had recently undergone hernia surgery but that his pain was higher up than typically felt in a hernia.

Claimant was referred to Dr. David Cancelada, who had performed his previous hernia surgery, and was eventually diagnosed with avascular necrosis with collapse of the

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[1] P.H. Trans. at 7.

[2] P.H. Trans., Resp. Ex. E at 3.

[3] P.H. Trans. at 10, 20.

femoral head on the right.[4] Claimant was taken off work on August 22, 2011, by Dr. Cancelada. He was later referred to Dr. Kenneth Gimple, for treatment. Dr. Gimple noted claimant incurred trauma "due to digging while at work on 08/04/2011."[5] When conservative treatment did not relieve claimant's symptoms, Dr. Gimple and claimant discussed surgery. Claimant was referred to Dr. Scott Cook, an orthopedic surgeon, for a second opinion. Claimant first saw Dr. Cook on October 25, 2011. Dr. Cook recommended claimant try to return to work with restrictions and, if claimant developed significant pain, Dr. Cook's next recommendation would be a total hip replacement. Claimant returned to work on October 31, 2011, and only worked two weeks. His pain increased while working, and he went back to Dr. Cook. Dr. Cook's medical record of December 6, 2011, notes:

> I do feel that [claimant's] avascular necrosis most definitely pre-dated his work injury on 08/04/2011. However, I feel that on that date while shoveling the asphalt is when he sustained the subchondral collapse of the femoral head. I believe the evidence for this exist [*sic*] in the fact that he had no pain prior to the injury and that he had significant edema and effusion on the postinjury MRI.[6]

In a letter to respondent's attorney dated December 27, 2011, Dr. Cook opined:

> As you know, [claimant] was injured on August 4, 2011 while working his job doing road maintenance for Shawnee County. At that time, he was shoveling asphalt when his shovel got stuck and he went to pick it up. This led to extreme pain in his right groin. I do believe that this did lead to a possibly permanent exacerbation in the patient's symptoms regarding an underlying and pre-existing condition of avascular necrosis involving the right hip. However, I do not feel that the incident when he went to pick up his shovel was the prevailing factor causing the injury. The underlying avascular necrosis was obviously present prior to this minor amount of trauma. Therefore, in my opinion, based on my understanding of the new changes to the Kansas Workers' Compensation Act, [claimant's] injury does not represent a compensable injury as the injury which occurred while at work was merely an aggravating factor not a prevailing factor.[7]

On January 10, 2012, claimant was examined by Dr. P. Brent Koprivica at the request of claimant's attorney. Claimant complained of severe right hip and groin pain. Dr. Koprivica found that claimant had avascular necrosis that preexisted his work injury of August 4, 2011, but the condition was asymptomatic. Dr. Koprivica further stated:

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[4] P.H. Trans., Resp. Ex. E at 4.

[5] P.H. Trans., Cl. Ex. 1 at 7.

[6] P.H. Trans., Cl. Ex. 1 at 26.

[7] P.H. Trans., Cl. Ex. 1 at 19; Resp. Ex. C at 1.

> It is speculative to state that [claimant] would require the surgical intervention that is necessary at this point without the intervening specific work injury that was sustained on August 4, 2011. It is certainly possible that that would be the case, but that is not predictable without speculation.
>
> The work injury of August 4, 2011, in terms of the injury from the shoveling activities, represents the direct, proximate and prevailing factor in the collapse of the femoral head. It is my opinion that the shoveling activities that he performed represent the prevailing factor producing the collapse of the right femoral head.
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> . . . .
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> [The] need for the right total hip arthroplasty arises because of the development of the femoral head collapse and the development of pain associated with this condition. . . .
>
> I would note that [claimant's] August 4, 2011, injury does not solely represent aggravation, acceleration or exacerbation of his avascular necrosis. The reason there is right hip pain at this point is because of a new injury with a fracture of the femoral head as noted by the subchondral collapse. This is a new structural injury directly attributable to the August 4, 2011, injury.[8]

Dr. Cook performed a left total hip replacement on January 23, 2012. At the time of the preliminary hearing, claimant had not been released to full and unrestricted job duties since his surgery. He was terminated by respondent on March 15, 2012, because he ran out of FMLA leave.

Dr. John Gilbert, an orthopedic surgeon, reviewed claimant's medical records at the request of respondent. Dr. Gilbert, in his report of April 4, 2012, stated:

> I am of the opinion that the prevailing factor in the onset of [claimant's] symptoms is the pre-existing avascular necrosis and that the collapse under load represents the natural history of his pre-existing disease for which the injury of August 4, 2011 was the exacerbating factor, but not the prevailing cause.[9]

Claimant was seen by Dr. Dan Gurba, an orthopedic surgeon, on April 5, 2012, at the request of respondent. Claimant told Dr. Gurba he was shoveling asphalt when he felt a sudden pain in his right groin. Dr. Gurba reviewed claimant's previous x-rays, CT scan and MRI. He stated it appeared claimant had a large segment of osteonecrosis of the right femoral head that preexisted his injury of August 4, 2011. The CT scan on claimant's right hip from June 2001 documented a large cystic change in the right femoral head. Dr. Gurba stated:

> [T]he fact that the patient had a significant aggravation of his symptoms following the work injury does not make the work injury the prevailing factor for his need [for]

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[8] P.H. Trans., Cl. Ex. 1 at 40-41.

[9] P.H. Trans., Resp. Ex. A at 3.

a hip replacement. In fact, the prevailing factor for the need for hip replacement in this patient was his underlying and pre-existing avascular necrosis, which is well-documented. Although the subchondral collapse most likely happened with the work injury, this is not something that would have happened in an otherwise normal hip joint. I agree with Dr. Cook's previous assessment that the prevailing factor for this patient's need for hip replacement was not his work injury, but rather the pre-existing avascular necrosis of the right femoral head.[10]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

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[10] P.H. Trans., Resp. Ex. B at 3.

> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . . .
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> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

ANALYSIS

In order to find claimant's injury arose out of his employment, the accident must be determined to be the prevailing factor causing the injury, medical condition and resulting disability or impairment. Here, claimant's accident was the forceful pushing on and lifting of the shovel load of asphalt. Claimant's injury is the collapse of the femoral head. The femoral head would not have collapsed absent the existence of avascular necrosis at that location. The trauma from shoveling asphalt would not have caused such an injury in a normal, healthy bone. The preexisting avascular necrosis was the prevailing factor causing the injury, medical condition, need for hip replacement surgery and resulting disability.

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[11] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[12] K.S.A. 2011 Supp. 44-555c(k).

CONCLUSION

Claimant has failed to prove he sustained personal injury by an accident that arose out of his employment with respondent because the accident was not the prevailing factor causing his injury, medical condition and disability.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated April 13, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
janfisher@mcwala.com

Larry G. Karns, Attorney for Respondent and its Insurance Carrier
lkarns@mvplaw.com

Rebecca A. Sanders, Administrative Law Judge